No. 19,882

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC LAND COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Southern District of California Northern Division

Honorable M. D. Crocker, Judge

APPELLANT'S REPLY BRIEF

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I

COMMENT ON APPELLEE'S BRIEF

A reading of the brief filed by the United States demonstrates a failure on its part to recognize any distinction between the court's right to review a determination by a governmental officer that the taking of defendant's property is necessary for or advantageous to the public use authorized by the statute and the power of the court to review an arbitrary taking of private property without such a determi-

nation for a use or uses other than the use authorized by the statute.

The United States claims, and the District Court held, that when the Secretary of the Navy decided that the United States would take the oil, gas and mineral rights underlying these properties that decision was final and the District Court had no jurisdiction to review the decision.

Southern Pacific Land Company claims (1) that there was no determination by the Secretary of the Navy that defendant's oil, gas and mineral rights were necessary for or advantageous to the use authorized by the statute under which this condemnation was made and that even if such a determination on the part of the Secretary of the Navy would have been binding upon the court, a decision to take without such determination is subject to review; and (2) that even such a determination of necessity is subject to review if it affirmatively appears that such determination was not in good faith or was arbitrary or capricious or an abuse of the discretion given to the Secretary of the Navy under the statute.

The Secretary of the Navy had no authority to take any estate in defendant's lands except under Public Law 968 (United States Statutes Volume 70, Chapter 939) which authorized him to acquire property *to establish a Naval Air Station at Lemoore, California.* The Complaint in Condemnation was filed pursuant to this authority and pursuant to Title 40 USCA Section 257 which provides that where a governmental officer has been authorized to procure real estate *for*

a public use he may acquire the same by condemnation *whenever in his opinion it is necessary or advantageous to the government to do so.* The Complaint in Condemnation alleges that the use for which the estate is taken is the establishment of a Naval Air Station at Lemoore, California, and for *military and naval purposes* in connection therewith. The Declaration of Taking Act (Title 40 USCA Section 258(a)) expressly requires as a condition precedent to the taking a Declaration of Taking stating *the public use* for which the estate is taken. The Declaration of Taking in this case states that these properties were taken *"for military and naval purposes for the establishment of a Naval Air Station, Lemoore, California."*

Thus, it is clear from the Act of Congress authorizing the taking, from the Complaint in Condemnation, and from the Declaration of Taking that the Secretary of the Navy had no authority to take these properties for any use other than military or naval uses connected with Lemoore Naval Air Station. Yet, Mr. Bantz testified under oath that when he made his decision to take the oil, gas and mineral rights he knew that they would not and could not be used for those purposes and that his decision to condemn these rights was based on the possibility of speculative future uses in no way connected with the military or naval purposes of Lemoore Naval Air Station.

Defendants alleged in their answer that the taking of the oil, gas and mineral rights was not for a public use or for the purposes of the Naval Air Station and that under these circumstances Mr. Bantz's decision

to take the oil, gas and mineral rights was arbitrary, capricious and unreasonable and an abuse of discretion. In spite of the District Court's denial of its motion to strike these defenses the United States refused to produce any testimony upon the subject and in its brief refuses to comment upon the testimony of Mr. Bantz.

We submit that the distinction between the jurisdiction of the court to review an exercise of the discretion given to the Secretary of the Navy to determine the necessity for the taking for the use authorized, and the power of the court to review an arbitrary taking without such determination or for other purposes is a real one and is decisive on this appeal, and that when considered in the light of this distinction appellant's position is supported by all of the decisions cited both by the United States and by Southern Pacific Land Company.

II

THE DECISIONS CITED BY THE UNITED STATES DO NOT SUPPORT ITS POSITION

The United States has cited more than fifty decisions in its brief. It is impossible to discuss each of those decisions if this brief is to be kept to any length which would be acceptable to this court. However, we are convinced that when properly analyzed in the light of their facts none of those decisions supports the position taken by the United States in the present

case, and we do wish to discuss those decisions most heavily relied upon by appellee.

In this connection we offer the following general comments:

1. With one exception (*United States v. Mischke,* infra), none of the decisions cited by the United States speaks in terms of "jurisdiction". Some of those decisions, in passing upon the exercise of a governmental officer's discretion to determine the necessity for taking property, hold that the court is bound by such determination and will not interfere with such an exercise of discretion under the circumstances there existing. However, in practically every instance the court did review the facts as a basis for its decision.

2. No case is cited in which the governmental officer made a decision to take private property without first making a determination that its taking was necessary or advantageous to a use authorized by the statute.

3. No case is cited in which the governmental officer who made the decision to take testified concerning his determination of the necessity for the taking or in which he testified that the property so sought to be taken could not be used and was not intended to be used for the purpose authorized by the statute. To our knowledge the case at bar is a case of first impression where such testimony is present.

4. The question of whether a court will review the determination of a governmental officer that the tak-

ing is necessary for the purpose authorized upon the ground that such taking is in bad faith or arbitrary, capricious or unreasonable or an abuse of discretion, has not finally been decided. The Supreme Court has expressly left this question open. The Circuit Courts of Appeal are in conflict.

A. The Supreme Court Decisions

In its opening brief Southern Pacific Land Company cited and discussed *City of Cincinnati v. Vester,* 281 U.S. 439, 50 SCR 360. We ask the court to carefully consider the analysis of that case contained in our opening brief. In that case, a governmental agency attempted to condemn an estate in land lying outside of that required for immediate use and attempted to justify the excess taking upon the basis of uses not authorized by the ordinance which authorized the condemnation. The Supreme Court called attention to the fact that the municipality was required to specify definitely the purpose of the appropriation (as was the United States in the present case under the Declaration of Taking Act) and held that the condemnation could not be justified for uses not so specified. The following language of the Supreme Court is particularly applicable.

> "It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question of what is a public use is a judicial one. . . . The question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

"We are thus asked to sustain the excess appropriation in these cases upon the bare statements of the resolution and ordinance of the city council, by considering hypothetically every possible, but undefined, use to which the city may put these properties, and by determining that such use will not be repugnant to the rights secured to the property owners by the Fourteenth Amendment.

* * *

". . . The city's contention is so broad that it defeats itself. It is not enough that the property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. Under the guise of an excess condemnation pursuant to the authority of the constitutional provision of Ohio, private property could not be taken for some independent and undisclosed public use."

We repeat our contentions that *Cincinnati v. Vester* is direct authority here where the United States seeks to condemn an excess estate in appellant's lands for uses other and beyond those authorized by Congress and stated in the Declaration of Taking. In the words of the Supreme Court in *Cincinnati,* this court is asked to sustain this excess appropriation upon the bare statements in the Declaration of Taking and Complaint in Condemnation and by considering hypothetically possible, but undefined, uses not authorized by Congress, to which the government might some day put these properties. This question is a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution.

At page 7 of its brief the United States argues that *Cincinnati v. Vester* "rests on a narrow view of eminent domain under state law and does not apply to the exercise of the federal power." This is not true. It is true that in *Cincinnati v. Vester* the court had under consideration the power of a municipality to condemn private property under the authority of a municipal ordinance but the power to condemn was determined by the Supreme Court of the United States under the Fourteenth Amendment to the Constitution of the United States which contains the identical prohibition against depriving any person of property without due process of law that is contained in the Fifth Amendment. The Federal Government has no greater power to deprive a citizen of his property without due process of law than has a state or a municipality.

At pages 10 through 12 of its brief, the United States argues that there is a distinction between "public use" and "public purpose" and that *Cincinnati v. Vester* represents a narrow concept of public use as distinguished from public purpose frequently followed by state courts.

In support of this claimed distinction, the United States points out that in the later case of *Berman v. Parker,* 348 U.S. 26 (infra), the Supreme Court talks in terms of public purpose rather than public use. Appellee also points out that in the *Berman* case and in several other cases cited at page 12 of its brief, it was held that condemnation was proper even though the property condemned was to be maintained and operated by private individuals.

It is true that the *Berman* case spoke in terms of public purpose. This was true because that case involved the constitutionality of the statute in question rather than the actual taking. The court does not mention or discuss any such distinction as is urged by appellee and the decision itself, as well as all of the other decisions cited by the United States upon this subject, simply holds that where it is determined that the taking of private property is necessary for a public purpose, and that this purpose may be best served in private enterprise, such use is in effect a public use. This does not mean that the property can be taken for a use unrelated to the purpose to be accomplished under the statute or for a use other than that authorized by the statute or described in the declaration of taking. In every case cited by the United States upon the point, the property was taken to be used for the purpose authorized by the statute and was a public use even though the property was physically operated by private individuals.

In this connection it will be noted that the Fifth Amendment speaks in terms of "public use." The words "public purpose" are not used. It will also be noted that Title 40 USCA Section 257, which authorizes condemnation procedure in a case of this kind, permits condemnation *"for public uses"*. We also remind the court again that the Complaint in Condemnation filed by the United States Attorney at the direction of the Secretary of the Navy alleges the "public use" for which the property is sought to be taken. The Declaration of Taking Act, Title 40, USCA Section 258(a), which provides for the vest-

ing of title in the United States in lands acquired for a *"public use"*, requires that the Declaration of Taking shall state that the lands are taken for the *"use"* of the United States and shall contain "a statement of . . . the *'public use'* for which said lands are taken." None of these Acts speak of "public purpose". The "public use" alleged in the complaint is the establishment of Lemoore Naval Air Station.

A reading of the decisions cited by both the United States and Southern Pacific Land Company in their briefs will demonstrate that the courts for the most part have spoken of public purpose and public use interchangeably and without distinction, and that the distinction here sought to be made is a product of counsel's own thinking and not of any judicial pronouncement.

The United States cites *United States v. Welch,* 327 U.S. 546, as taking a contrary view to that taken in *Cincinnati v. Vester.* In the *Welch* case Mr. Justice Black in his opinion did discuss the *Cincinnati* case and did distinguish it on its facts but he did not overrule it, either expressly or by implication. Mr. Justice Black distinguished the *Cincinnati* case from the *Welch* case upon the ground that in the *Cincinnati* case the attempted taking was not for a use authorized by the statute while in the *Welch* case the taking was for a use authorized by the statute (p. 552). Mr. Justice Black's final comment on the power of the court to review even an act of Congress permitting the condemnation of property for a specific use was that "its decision is entitled to a *deference* until it is shown to involve an impossibility." There is a sig-

nificant difference between "deference" and "lack of jurisdiction."

In the *Welch* case the Tennessee Valley Authority condemned certain lands outside of the immediate area where the Tennessee Valley Project was being constructed. This was for the purpose of eliminating very costly road building to an area isolated by the project and was done upon a determination of necessity by the Tennessee Valley Authority after much study and negotiation with the State of North Carolina and other agencies involved.

The court *did review* the Tennessee Valley Authority Act and the facts which led to the decision of the Tennessee Valley Authority to take this particular property and *upon such review* and *under that Act and those facts* concluded that the Act was sufficiently broad to permit the taking of the properties in question upon a determination by the Authority that the taking was necessary to carry out the purposes of the Act. The court held that since the Authority in its discretion had made such a determination of necessity for a use authorized by the Act the court would not interfere with that determination. The court said:

> ". . . The T.V.A. had a dual interest. First, the isolated area, while not actually submerged by the reservoir, was a part of the watershed. Left in private hands it could be used to frustrate some of the objectives of T.V.A. legislation (p. 549) . . .
>
> ". . . Section 4(1) of the Act empowers the Authority to condemn certain specified types of

property and concludes by referring to 'all property that it (the Authority) deems necessary for carrying out the purposes of this Act.' To make clear beyond any doubt the T.V.A.'s broad power, Congress in Sec. 25, 16 USCA Sec. 831x, 5 FCA title 16, Sec. 831x authorized the Authority to file proceedings, such as the ones before us, 'for the acquisition by condemnation of any lands, easements, or rights of way which in the opinion of the corporation are necessary to carry out the provisions of this Act.

"'All of these provisions show a clear Congressional purpose to grant the Authority all the power need to acquire lands by purchase or by condemnation which it deems necessary for carrying out the Act's purposes.' These proceedings were preceded by a T.V.A. resolution that it did deem these acquisitions necessary for such purposes. (p. 554) . . .

"We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority." (p. 552)

Mr. Justice Reed concurred in the decision but refused to join in the opinion because it might be construed as holding that "there is no judicial review of the Authority's determination that acquisition of these isolated pieces of private property is within the purposes of the TVA Act." Chief Justice Warren agreed with Mr. Justice Reed. Mr. Justice Frankfurter joined in the opinion of the court only upon the ground that he did not believe that it might be

construed as feared by Mr. Justice Reed. Mr. Justice Frankfurter stated his view as follows:

> ". . . This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial consideration, ultimately by this Court."

A reading of this case makes it entirely clear that the condemnation of the property in question was sustained only because it promoted the purposes of the Tennessee Valley Project and because the Tennessee Valley Authority in the exercise of its authorized discretion had determined that it did so. The court was not faced with a taking which in no way promoted the purpose of the project and which was insisted upon only because the governmental officer making the decision believed that the property might be of use to some other agency of the government in connection with some hypothetical purpose or project at some future time.

At numerous places in its brief the United States cites *Shoemaker v. United States,* 147 U.S. 282, and repeatedly says that the position taken by appellant in its opening brief and any statement made in any decision supporting that position is a departure or variation from the "Shoemaker rule". Again, this is not true. The *Shoemaker* case did not involve the act of a governmental officer or agency. It involved the constitutionality of an act of Congress authorizing the condemnation of lands for a public park in the District of Columbia. The issues there were in no way similar to the issues in the case at bar and the lan-

guage relied upon by appellee must be read and construed in the light of the issues there under consideration. The language cited by appellee is:

> "While the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet if this question is decided in the affirmative, the judicial function is exhausted; . . ."

It will be noted that the court did recognize the jurisdiction of the court to review a statute to determine whether the use for which a taking is authorized is in fact a public use. However, the court was not concerned with and did not pass upon its power to review a taking by a governmental officer or agency for a purpose or use beyond the legislative authorization or to review a taking by a governmental officer which is in bad faith or which is arbitrary or capricious or unreasonable or in abuse of his discretion.

The case most heavily relied upon by the United States is *Berman v. Parker,* 348 U.S. 26. That was an action by the owners of real property to enjoin a condemnation pursuant to the District of Columbia Redevelopment Act of 1945. The Act authorized the Redevelopment Agency to acquire real property by eminent domain for the redevelopment of slum areas in the District of Columbia. The Agency attempted to take appellant's land upon which a department store was located. Appellant objected that this property could not be taken constitutionally because it was commercial and not residential property and did not constitute slum housing and because the Redevelop-

ment Agency intended to place the property under private management for private and not public use. The Supreme Court held that the Act was a proper exercise of the police power and was constitutional and that it was immaterial that the purposes of the Act were to be carried out by private enterprise. The court further held that it was within the authority of Congress to attack the problem on an area basis rather than by a structure basis. The court stated:

> ". . . *Once the question of the public purpose has been decided,* the amount and character of land to be taken for the project and *the need for a particular tract to complete the integrated plan* rests in the discretion of the legislative branch . . .
>
> "The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F. Supp. 705, 715-719. We do not share those doubts. *If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so.* It is not for the courts to *determine whether it is necessary for successful consummation of the project* that unsafe, unsightly, or unsanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation."

This case determines just two things: (1) that the Act of Congress under which the taking was authorized was constitutional as an exercise of the police power,

and (2) that when the agency created under the Act *exercised its discretion to determine that the use of the entire property was necessary to the successful consummation of the authorized project,* it was not for the court to question the soundness of *that exercise of discretion.* The court did not hold that it lacked jurisdiction to protect the property owner against the taking of his property where there had been no such exercise of discretion and no determination that the property was necessary for the consummation of the project, or would in fact be used for any purpose connected with the project.

At page 14 of its brief, the United States states that *Berman v. Parker* rejects the idea that the project may be pulled apart and each parcel treated separately in determining whether the taking is for a public use. In that case the Redevelopment Agency was attempting to redevelop an area. The court held that this was a proper exercise of its discretion and that when it was determined by the Redevelopment Agency that appellant's property was needed as a part of the redevelopment of the whole area, this was a public use authorized by the statute and appellant could not insist that his property be considered alone. In the case at bar Southern Pacific Land Company does not ask that any of its property determined to be necessary or advantageous to the purposes of the Air Base be considered separately from any other property sought for that use. Its only objection is to the taking of a separate estate in that land which cannot and does not in any way advance

those purposes. Southern Pacific Land Company does not ask the court to "pull the project apart" or that the court substitute its judgment for that of the Secretary of the Navy as to what is necessary for the establishment, maintenance and operation of Lemoore Naval Air Station. It simply asks that the court protect it against the taking of property rights which in this area are normally reserved from any sale of such lands (Rep. Tr. p. 60) and which the Secretary of the Navy himself says were not intended to be used and cannot and will not be used in furthering the purposes of Lemoore Naval Air Station.

At page 8 of its brief, the United States states that in *Berman v. Parker,* the Supreme Court modified the decision of the court below "to preclude court examination of alleged arbitrary or capricious administrative action." This statement is not accurate. In the court below (*Schneider v. District of Columbia,* 117 Fed. Supp. 705, at 725) it was pointed out that the issue of arbitrary and capricious action was not pleaded and therefore was not at issue. The Supreme Court did not refer to any claim of arbitrary or capricious conduct and did not pass or comment upon whether any such defense would be a proper matter for court review.

At page 26 of its brief the United States cites *United States v. Carmack,* 329 U.S. 230, as reversing a finding that the selection of a site for a post office was an "arbitrary and unnecessary act." The court did reverse a finding that the selection of the post office site was an "arbitrary and unnecessary act" but it did

so on the merits after a review of all the facts rather than upon lack of jurisdiction. In answer to the Government's position that the court lacked jurisdiction to review such a determination against a charge of bad faith or capricious or arbitrary action the court said:

> "In this case, it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned. The record presents no such issue here." (p. 258)

B. The Decisions Of The Circuit Courts Of Appeals

In our opening brief we cited *Simmonds v. United States,* 199 Fed. 2d 305, which to our knowledge is the only decision in this Circuit passing upon this subject, wherein this court recognized the rule that the power of a governmental officer to take private property depends upon his determination in the exercise of his authorized discretion that the taking of the property is necessary or advantageous to the government for the use authorized; that before property is so taken it is the duty of the governmental officer to so exercise his discretion; and that his discretion so exercised is subject to attack if made in bad faith or is an abuse of that discretion.

This decision was followed in a subsequent decision in the Northern District of California, *United States v. 113.81 Acres of Land,* 24 Fed. Rules Decisions 368, wherein it was held on the authority of the *Simmonds*

case that such a defense may be raised by answer and is one which must be tried by the court.

The United States does not attempt to distinguish the *Simmonds* case except to state that it repeated a dictum and it concedes that other judges within the Ninth Circuit have taken the *Simmonds* case as authority for refusing to strike allegations of abuse of discretion.

At page 16 of its brief the United States cites the case of *United States v. State of South Dakota,* 212 Fed. 2d 14, decided in the Eighth Circuit, as holding that the taking of mineral rights in the condemnation of an airfield was not reviewable by the District Court. This case was also cited by Judge Crocker in a Memorandum Opinion as "impossible to distinguish." We must agree that superficially the facts of this case are closer to the facts in the case at bar than any other case cited. However, a closer analysis of the case will demonstrate not only that it is materially distinguishable but that the distinction is such as to clearly illustrate the real issue between the parties in the present case.

In the *South Dakota* case the United States sought to condemn real property in fee simple for the establishment of an Air Force Base. The State of South Dakota was the owner of the mineral rights and objected to the taking upon the ground that the acquisition of such mineral rights by the United States was not necessary for the authorized public use. The court reversed the judgment of the District Court dismissing the action as against South Dakota

upon the ground that the Secretary of the Army in his discretion had determined that the taking of the mineral rights was necessary for the purpose for which the land was sought (the establishment of the air base) and that such exercise of discretion was not reviewable.

In that case the act of Congress authorizing the condemnation expressly and explicitly authorized the Secretary of the Army to *condemn the title in fee simple.* There is no such specific authorization in the case at bar. The only authorization found in Public Law 968 authorizing the establishment of the Lemoore Naval Air Station is to acquire "property" and the only authorization found in Title 40 USCA Section 257 permitting condemnation procedure for this purpose is to acquire "real estate". Thus, in the *South Dakota* case, as distinguished from the present case, the Secretary of the Army was complying with the express language of the statute in acquiring the entire fee title.

Moreover, in the *South Dakota* case the issue on appeal was submitted upon the pleadings and Declaration of Taking and without further evidence. On the basis of the complaint and the Declaration of Taking the Circuit Court assumed that the Secretary of the Army had made a determination that the taking of the mineral rights was necessary for the purposes of the air base. In the absence of evidence to the contrary and since it was the duty of the Secretary of the Army to make such a determination before filing the Complaint in Condemnation and the Declaration of

Taking, this was a proper assumption. In this connection, it should be noted that there was no pleading or claim of bad faith or of arbitrary or capricious action on the part of the Secretary of the Army. These defenses were not put at issue by the pleadings and were not considered nor mentioned by the Circuit Court. Thus, the case can be of little assistance here where defendant's answer did put these defenses at issue and where the Secretary of the Navy testified as he did here.

As page 23 of its brief the United States cites *United States v. Mischke,* 285 Fed. 2d 628, also decided in the Eighth Circuit. In that case land was condemned for the purpose of constructing a dam for flood control. The Complaint in Condemnation, the Declaration of Taking signed by the Secretary of the Army, and a letter from the Secretary of the Army asking that the Attorney General take action to condemn, all indicated that the Secretary of the Army had in his discretion determined that all of the land in question was "necessary and advantageous for use in connection with the construction and operation of the Gavins Point Dam and Reservoir Project." There was no evidence such as was presented in the case at bar showing that he had not exercised such discretion and had not made such determination. The defendant objected to a portion of the taking which consisted of land adjoining the reservoir and the Government introduced evidence at the trial that this land was needed for use as a means of access to the reservoir, as well as a place for the parking of cars and the

launching of boats by persons visiting the reservoir for purposes of recreation. The District Court held that the taking of the excess lands was arbitrary and capricious and ordered that these lands be revested in the defendants. The Circuit Court reversed this judgment.

In this case it was clear that the Secretary of the Army did exercise his discretion and did determine that the taking was necessary for or at least advantageous to the use authorized by Congress and the United States produced evidence to substantiate such determination. Upon the basis of conflicting evidence presented by the defendants the District Court found that the taking of the excess lands was not necessary for that purpose and would not be used for that purpose and his determination to this effect was arbitrary and capricious. Upon this conflicting record the Circuit Court rejected the defense stating that such determination by the Secretary of the Army was not subject to review and that the District Court was without jurisdiction to enter the order appealed from. However, in so holding the Circuit Court conceded that there were cases in other jurisdictions, including the Ninth Circuit, from which a contrary decision might be reached.

We submit that both the *South Dakota* case and the *Mischke* case must be distinguished from the case at bar upon the ground that in both cases the court had under consideration a decision by an administrative officer that all the estate condemned was necessary for the purpose authorized while in the case at bar the

Secretary of the Navy by his own testimony made no such determination and intended the contrary. We further submit that if there is a conflict between the rule in the Eighth Circuit and the Ninth Circuit and/or other Circuits concerning the court's jurisdiction to pass upon the good faith of a governmental officer where he does make such a determination of necessity, and it is alleged that such determination is arbitrary, capricious or unreasonable, then that conflict should be resolved so as to protect the property owner. We cannot believe that the courts are entirely powerless to protect a property owner against the taking of his property when such taking is in excess of authority and/or is in bad faith, or is arbitrary or capricious. It may be true as stated in some of the cases that restraint should be shown in exercising such jurisdiction, but we believe jurisdiction does exist and should be exercised in a proper case.

At page 11 of its brief, the United States cites *Arp v. United States,* 244 Fed. 2d 571. The governmental officer involved, the Public Housing Commissioner, sought to condemn the fee title in land it already had under lease after having made a determination that "the acquisition of the fee simple title was necessary to continue in use housing constructed on the lands in the orderly demobilization of the war effort, to maintain the improvements constructed thereon, and to protect the Government's interest in the improvements." The defendant alleged that the taking of the fee was not necessary and that the Commissioner's determination was arbitrary and in bad faith. The

Circuit Court held that the defense was properly stricken *because it was "without merit" under the facts there presented and under the particular provisions of the Housing Act there involved which expressly gave the Housing Commissioner the right to make such a determination of necessity and upon such determination to file a supplemental complaint to obtain fee title to lands so held under lease.* The court did not hold that it lacked jurisdiction to review the decision and it did review it.

At page 15 of its brief the United States cites *Wilson v. United States,* a case decided in the Tenth Circuit on September 1, 1965. This case is particularly interesting because it is referred to by the United States as the most recent decision on the subject. In a footnote on page 22 the United States says that the opinion is as yet unreported and that copies will be filed with appellee's brief and delivered to appellant's counsel. Apparently, this has not yet been done. In this case the United States condemned property for the construction of a dam and reservoir. *In so doing it sought to acquire a fee simple title to the land but did exactly what appellant seeks to have done in the case at bar, to wit: reserved to the landowners the gas and oil rights upon condition that gas and oil could be prospected for and removed only under regulations imposed by the Secretary of the Interior.* Thus the question of oil, gas and mineral rights was not at issue. However, the landowners objected that the government sought to condemn more surface rights than was necessary for reservoir purposes. The Solicitor of

the Department of the Interior *had determined that all of the lands in question were necessary and would be used in connection with the project,* and the Circuit Court held that this determination was within the discretion given to him under the statute there involved. However, the defendants claimed that in making this determination the Solicitor acted in bad faith and was arbitrary and capricious in including more lands than were actually necessary.

Again, the Circuit Court did not deny jurisdiction although it determined this defense against defendants *on the merits,* concluding that there was no proof of bad faith or of arbitrary action. In so holding, the court recognized, at least by implication, its jurisdiction to look at the facts for the purpose of determining whether the solicitor's discretion was exercised in good faith and whether or not his decision was arbitrary or capricious. The court pointed out that in this case the government had simply taken advantage of established boundary lines rather than making a new survey and that this was reasonable to avoid the expense involved in establishing new boundaries. The court held that this was a reasonable "determining principle" for the solicitor to take into consideration and this being true, the fact that in so fixing the boundaries more land was taken than was absolutely necessary for the basic public use did not taint the taking with bad faith or arbitrariness or capriciousness. The court said:

> "... *In the absence of bad faith,* and bad faith is not demonstrated here, if the use is a public one,

the necessity for the desired property as a part thereof is not a question for judicial determination.

"In the ordinary sense of the meaning of the word 'arbitrary', it may be said that there has been an excessive arbitrary taking in this case. However, it falls within an 'authorized' or 'licensed' arbitrariness *because it is made with some determining principle.* Considering the nature of the lands taken and possible subsequent uses for the lands, it is reasonable to avoid the expense involved in establishing new boundaries following contour lines that would be established at maximum water elevation to the reservoir. *Under such circumstances,* the so-called arbitrary taking is within the authorized discretion of the federal officer involved and is not *in this instance* tainted with bad faith or capriciousness. We must find that there is *no merit* to the landowners' points. . . .

"From a review of the whole record it appears that the trial court committed no substantial error. . . ."

It is clear that the defenses of bad faith and of arbitrary and capricious action in this case were decided on the merits and that the case is no authority for the position of the United States in the case at bar that the court has no jurisdiction to determine such a defense.

At pages 8 and 17 of its brief the United States cites the decision of this court in *United States v. Cobb,* 328 Fed. 2d 115. That case is not authority for the position of the United States in the case at bar.

There, the United States in filing a Declaration of Taking estimated the amount of damage or value to be $1.00. The District Court ordered the Declaration of Taking set aside and vacated upon the ground that the estimate was not made in good faith. This court reversed the order. Obviously, the questions involved in the case at bar were not involved in the *Cobb* case. The fixing of the amount of the deposit was simply a part of the *procedure* by which the defendant would finally obtain just compensation which by the express language of the Declaration of Taking Act is left to the discretion of the condemning agency. The court pointed out that it is not required that the government make any deposit and neither the amount of the deposit nor the making of the deposit ultimately determines what property is to be taken or the amount of the just compensation to be paid to the defendant. The defendant's constitutional rights were in no way involved. Thus, this court correctly held that it would not interfere with the discretion of the condemning agency. This is no authority in the case at bar which involves the right of the United States to take property it is not authorized to take and does not intend to use for the purpose authorized and which involves the fundamental property rights of the defendant as protected by the Constitution and the Fifth Amendment. The basis for the decision in the *Cobb* case was as follows:

> "In the first place, the administrative officials have been delegated the authority to make the declaration of taking and to make the estimate . . .

"The main objection to permitting the Judge to go into the question of good faith is that he thereby could do what he clearly is not authorized to do, namely, pass upon the appropriate amount of deposit . . .

"Of course, it is elementary that the Government could take the property without any deposit and leave the owner to his remedy in the Court of Claims under the Tucker Act. United States v. Dow, 357 U.S. 17, 21, 78 S.Ct. 1039, 2 L.Ed. 2d 1109. That on occasions a nominal sum such as $1.00 may properly be deposited is plain."

It is significant that in reaching this decision the court did not feel required to mention or refer to the *Simmonds* case or any other case cited in these briefs.

III

ANSWER TO MISCELLANEOUS ARGUMENTS MADE IN APPELLEE'S BRIEF

At page 4 of its brief the United States says that defendant's answer seeks to limit the estate taken by reserving minerals including oil and gas. The United States is entitled to state the effect of defendant's answer in words it chooses to use. However, Southern Pacific Land Company wishes to state its position differently. The mineral rights constitute a separate, severable estate in the land. Southern Pacific Land Company did not contest the taking of the surface rights because those rights were necessary and were to be used for the establishment of the Air Station. It did contest the taking of the mineral rights because those rights could not and were not intended to be used for the purposes of the Air Station. Southern Pacific Land Company does not seek to limit the extent of the estate determined by the Secretary of the Navy to be necessary for the purpose authorized. It does seek to prevent the taking of an estate as to which no such determination was made or could be made.

At page 6 of its brief the United States refers to the fact that Judge Crocker filed a memorandum decision in which he stated that he found no evidence to support the allegation that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously. However, the memorandum decision was superseded by complete and detailed findings of fact placing his decision entirely on the premise that he had no jurisdiction to review the determination of the Assistant Secretary of the Navy or to pass upon the

defense that the taking was in bad faith or arbitrary or capricious. Consistent with this holding, no finding was made upon this defense. Since Judge Crocker's actual conclusion was that he had no jurisdiction to consider the testimony of Mr. Bantz, it is clear that the statement made in his memorandum was not based upon any real consideration of that testimony.

At page 7 of its brief the United States argues that the cost of a federal project is relevant to its decision to take and that the eminent domain power can be used to recoup investments or to avoid undue expense. Assuming this to be true, it has no application here. No property right can be taken without just compensation. Obviously, the cost of the project with the oil, gas and mineral rights would be more than its cost without those rights. It does not avoid undue expense to take property that is not needed for the project.

At page 9 of its brief the United States seems to concede that a court has power to review an administrative determination on account of alleged bad faith but questions that power for arbitrary or capricious action. It is argued that if the rule were otherwise the issue simply becomes one of weighing the factors for and against the administrative decision. The United States says "this is not the court's business." To begin with, we disagree with the premise that in determining arbitrary or capricious action the issue amounts to no more than a weighing of the factors for and against the administrative decision. A determination that such a decision was arbitrary or capricious would entail more than a weighing of such factors and more than

disagreement with the decision on the part of the court. However, in the case at bar it is not necessary to reach an exact definition of what is meant by arbitrary or capricious action. Where a governmental officer decides to take private property knowing that its use is completely incompatible with the use for which he is authorized to take the property, and testifies that the United States had no intention of using the property for that purpose, and attempts to justify his decision solely upon the ground that there is no limitation upon his power to take, that the court has no jurisdiction to protect the landowner, and that it is no business of the court, his conduct in so doing is an abuse of his discretion whether such abuse is described in terms of bad faith or arbitrary or capricious conduct or otherwise. We believe that it is the court's business to protect every landowner against such action and to assure to every landowner the protection to property rights guaranteed by the Constitution.

At page 9 of its brief the United States says it is sure Southern Pacific Land Company will not challenge the Constitutional power of Congress to establish a naval air station. This is true. It then says that the statutory authority of the Navy Department to acquire land needed for the purposes of Lemoore Station is equally clear. This is also true. However, it does not follow that the Navy Department has authority to acquire an estate in the land which is a separate estate and is concededly not needed for the purposes of the Naval Air Station, or that the court is without jurisdiction to prevent such a taking.

At pages 21 to 26 of its brief the United States discusses some of the conflicting decisions concerned with the power of a Federal Court to review a taking alleged to be in bad faith or arbitrary, capricious or in abuse of discretion. It is argued that any recognition of a right of review in these cases ignores the rule of the *Shoemaker* case and amounts to nothing but "unconsidered dictum". The United States includes in this category the decision of this court in the *Simmonds* case. Most of these decisions have been discussed elsewhere and it will be noted that those courts recognizing such power to review do so on various grounds. Some speak of bad faith and seem to limit the power of review to cases of bad faith. Others speak of arbitrary or capricious action. Others speak in terms of abuse of discretion. Others use such terms as "unreasonable" or "impossible". The principle is the same whatever language is used to describe it. We again submit that the action of the Assistant Secretary of the Navy in this case is in bad faith *and* is arbitrary, capricious and unreasonable *and* is an abuse of his discretion. As such, it is subject to review regardless of what terminology the court chooses to use in so holding.

At page 17 and again at page 22 of its brief, the United States argues that bad faith must be limited to personal wrong-doing on the part of governmental officer involving "bribery, corruption, personal malevolence or dereliction of duty in the nature of a fraud or some personal interest or sinister motive." To this effect the United States cites a decision of the District

Court of the Northern District of Illinois, *United States v. 40.75 Acres of Land,* 76 Fed. Supp. 239. In that case the defendants alleged bad faith. They did not allege arbitrary or capricious action or abuse of discretion in those terms. Therefore, the court talked only in terms of "bad faith" and did suggest that bad faith meant actual malevolence toward the defendants *unless the taking was for a use not authorized by the statute.* Of course, it is this last conception of bad faith that is the essence of appellant's position in the case at bar. The court stated:

> ". . . *If a taking is for a use not authorized by statute, as the contention was made in the Barnidge case, it may be said to be a taking in bad faith.*
>
> * * *
>
> "None of the foregoing cases, however, is explicit as to the meaning of bad faith. In the law of torts bad faith can mean either the mere lack of legal excuse or an actual malevolent purpose. As a restraint on the power of eminent domain, *apart from the public use inquiry which goes to the lack of legal excuse for the taking,* I think that bad faith means actual malevolence toward the complaining defendants . . ."

We do not agree with the thinking of the Illinois court that bad faith should in any event be limited to actual malevolent conduct toward a defendant. Bad faith can take on many forms and no good reason was advanced for giving it such a narrow meaning. However, we do agree with the limitation placed upon that meaning where private property is taken for a use not au-

thorized by the statute. Such a taking is not only within any reasonable definition of bad faith but may also be described as arbitrary and capricious and in abuse of whatever discretion is placed in the condemning agent.

At page 27 of its brief, the United States cites *United States v. Merchants Transfer and Storage Co.*, 144 Fed. 2d 324, decided by this court, as stating that "In essence, while protesting the contrary, the (lower) court substituted its judgment on the question of *public necessity* for that of the Secretary." This quotation illustrates the point we are attempting to make. The court will not substitute its judgment on the question of *public necessity*. It will reverse an arbitrary decision to take property where no such determination of public necessity for the use authorized by the statute was made and where it is conceded that none exists.

Again at page 28 of its brief the United States insists that inevitably the review process leads the court into engineering matters or other matters not suited for determination according to the adversary process of litigation. The United States argues that for this reason the decision should be left to those to whose judgment Congress entrusted it. If in the case at bar the Secretary of the Navy had made a determination upon engineering or other expert advice that the taking or use of these oil, gas and mineral rights was necessary or advantageous to the United States in the establishment or operation of Lemoore Naval Air Station, this court would be faced with a different

question. It is clear that this was not and is not the situation here involved.

At page 28 of its brief the United States argues that it must take appellant's oil, gas and mineral rights because other landowners whose lands are taken for the Lemoore Naval Air Station must receive equal treatment and it is unlikely that all other landowners would be willing to defer exploration or production during the existence of the air base. It is argued that in such case such owners would probably demand the full present market value of the mineral rights, despite the reservation. Obviously, this argument has no merit. Unless a landowner voluntarily agreed to defer exploration and production, it would of course be *necessary* to condemn the mineral rights. This would be a use directly connected with the establishment of the air base. Likewise, if any property owner claimed additional compensation because his right to explore or produce was deferred it would then be a matter of administrative discretion to determine whether it would be advantageous to the government to take the mineral rights or pay the additional compensation. However, Southern Pacific Land Company did voluntarily offer to defer exploration and production and did not seek additional compensation because thereof and equal treatment to all is accomplished if equal treatment is given to all who stand in this same position.

At page 29 of its brief the United States again argues that if the public is to pay for the mineral rights, because of its interference with the landowners

ability to extract the minerals, it should obtain title to the rights so as to secure such values as they may have in the future. We repeat that Southern Pacific Land Company has never asked for compensation for the deferment of its present ability to extract the minerals, and it did not in its pleadings or at the trial pray for any such compensation or suggest that it should be so compensated. It has always offered to defer its right to extract minerals without compensation so long as a Naval Air Station remains on the property, and its only insistence is that it is entitled to retain those rights for whatever they may be worth if and when the air base may be abandoned. The court will note the stipulation of the parties provides that the amount fixed by such stipulation as just compensation for the taking is by way of compromise and settlement of the issue of just compensation alone and that in determining other issues in the case it will not be presumed nor inferred that said sum does or does not include any amount as the fair market value of the mineral rights and that neither the said stipulation nor the award of said amount as just compensation shall be considered by the court in any way in making any determination of whether the United States is or is not entitled to the mineral rights or whether the mineral rights shall be reserved to the defendant owner or what conditions or limitations shall be placed upon said reservation. (Tr. of Rec. pp. 715-716).

At page 29 of its brief the United States argues that when once it has taken property for a specific use, the

title is not limited to that use and that it is not impossible that in the future this land might be converted to another federal use not incompatible with mineral extraction. This is what Mr. Bantz testified he had in mind when he made the decision to take the mineral rights. It is true that if the oil, gas and mineral rights were taken for some military or naval use connected with the operation of Lemoore Naval Air Station, and the Naval Air Station were thereafter abandoned without those rights having been exhausted, the oil, gas or other minerals would be available for another public use. Any such future use would be incidental to the authorized use for which the property was taken. However, it does not follow that Mr. Bantz was authorized to take the mineral rights for any such hypothetical future use by "another federal agency" without any initial intent to use them for the purposes of Lemoore Naval Air Station.

At pages 29 and 30 of its brief the United States argues that because all of the property taken will not be used for runways a review of the secretary's decision to take would inject the court into engineering details concerned with the planning and operation of the air station. This is not true. We ask only that the court accept the testimony of Mr. Bantz (and the other government witnesses who were subpenaed and testified) that the extraction of oil, gas or other minerals from the property during the life of the air station would be completely incompatible with its use as an air base, and that the Department of the Navy did not have and has no intention of extracting or

using such oil, gas or other minerals. This does not inject the court into any of the engineering details of planning or operations or otherwise.

Finally, at page 30 of its brief the United States objects to the form of the reservation of oil, gas and mineral rights suggested in appellant's opening brief because it was never considered or reviewed by the District Court and because the District Court did not make findings in respect thereto. A reservation to this effect was offered in defendant's answer and at the trial of the action defendant offered to arrive at a form of reservation satisfactory to the United States or to permit the court itself to draft such a reservation (Tr. of Rec. p. 361; R. Tr. p. 157). These offers were repeated in appellant's opening brief (p. 38). The United States rejected all these offers and refused to discuss them. At the trial the United States refused to cross examine defendant's witnesses or to produce evidence of its own and chose to rely entirely upon its claim that the court had no jurisdiction. Thus, the testimony of defendant's witnesses is uncontradicted in the record. The District Court failed to make findings in accord with their testimony or in reference to the proposed reservation only because it accepted appellee's contention that it had no jurisdiction to do so. The United States is not now in a position to complain because there was no further evidence upon the subject or of the failure of the District Court to make a finding upon the subject, and this court may enter judgment as requested in Appellant's Opening Brief (See pages 35 to 42).

In a footnote at page 30 of its brief the United States takes issue with appellant's claim that the mineral rights constitute a separate estate in the land and in so doing criticizes *United States v. 4.553 Acres of Land, etc.,* 208 Fed. Supp. 127 (N.D. Cal. 1962) cited by appellant at page 22 of its opening brief. The United States points to the fact that where mineral rights are taken the entire estate in the land including the surface rights and mineral rights must be valued as a whole in a condemnation award and that the estate taken must be controlled by federal law. In a general sense this is true insofar as it involves matters of procedure in the Federal Courts or rights under the Federal Constitution or Federal Law, but it is not true insofar as it purports to involve a determination of the character and incidents of property rights in California (*United States v. Certain Properties,* 306 Fed. 2d 439 at 444). We believe it almost elementary that a fee simple title may include severable estates in the land and the fact that the United States seeks to condemn all those estates does not mean that it is entitled to do so under the facts here presented. We again remind the court that in *Wilson v. United States,* supra, cited by the United States as the most recent decision on the subject, the United States treated the oil, gas and mineral rights as a separate estate in the land and voluntarily reserved them to the landowners althought the declaration of taking and the complaint in condemnation described the taking it sought as a "fee simple title". The court described the estate sought to be taken as follows:

"The interest in the lands sought to be acquired was a fee simple title excepting and reserving therefrom gas and oil which may be prospected for and removed under regulations imposed by the Secretary of the Interior . . ."

Appellant respectfully urges the court to enter judgment as prayed for in appellant's opening brief.

Dated, Fresno, California,
December 9, 1965.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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